United States Department of Labor
Employees' Compensation Appeals Board

THIRSTON JENIOUS, JR., Appellant	)	
	)	**Docket No. 04-2215**
and	)	**Issued: June 13, 2005**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS ADMINISTRATION MEDICAL CENTER, Seattle, WA, Employer	)	

Appearances:
Thurston Jenious, Jr., pro se
Office of Solicitor, for the Director

Submitted on the Record

DECISION AND ORDER

Before:
WILLIE T.C. THOMAS, Alternate Member
MICHAEL E. GROOM, Alternate Member
A. PETER KANJORSKI, Alternate Member

JURISDICTION

On September 9, 2004 appellant filed a timely appeal from the Office of Workers' Compensation Programs' merit decision dated July 19, 2004, which denied his claim for a recurrence of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the case.

ISSUE

The issue is whether appellant met his burden of proof to establish that he sustained a recurrence of disability on and after December 2, 2000 causally related to the accepted employment injury of August 6, 1998.

FACTUAL HISTORY

On August 7, 1998 appellant, then a 49-year-old food service worker, filed a claim for compensation benefits alleging that he sustained a back injury on August 6, 1998 when dumping garbage. The Office accepted that he sustained cervical and thoracic subluxations. Appellant

did not stop work but returned to a part-time limited-duty position. He resigned on December 1, 2000 and submitted a claim for leave buy back for unspecified dates.[1]

Appellant was treated by Dr. Eric D. Hansen, a chiropractor. In reports dated October 1, 1998 to March 28, 2000, he diagnosed recurrent spinal subluxation complexes of the cervical, thoracic and lumbar spine resulting from the injuries of June 15, 1997 and August 6, 1998. He advised that appellant worked modified duties but intermittently stopped work when he experienced flare-ups of his condition. Appellant was also treated by Dr. Michael D. Harris, a psychologist, who noted in reports dated October 7 and 8, 1999, that appellant should participate in a pain management program to return to full-time work. In reports dated November 10, 1999 and June 12, 2000, Dr. Dan Welch, Board-certified in physical medicine and rehabilitation, diagnosed degenerative disc disease and joint disease in the lumbar spine. He also recommended a pain management program.

Appellant was referred for a second opinion examination, by Dr. Scott Van Linder, a Board-certified orthopedic surgeon, on whether he continued to experience residuals of his accepted work-related injury of August 6, 1998. In a medical report dated June 7, 2000, Dr. Van Linder opined that he continued to have residuals of his work-related injury and recommended a rehabilitation and reconditioning program. In a work capacity evaluation he advised that appellant could return to work eight hours per day with restrictions of no more than 2 hours of sitting, walking, standing, reaching above the shoulders, no pushing or pulling over 60 pounds, lifting of no more than 30 pounds and limited squatting, kneeling and climbing.

Appellant submitted medical records from Dr. Hansen dated June 2 to November 10, 2000. On August 30, 2000 Dr. Hansen advised that he did not anticipate seeing appellant any further for his injury except to treat occasional flare-ups of his back. On August 10, 2000 Dr. Welch determined that the return to work pain management program was not suitable for appellant and discharged him from his care. In a report of October 29, 2001, he recommended a psychological evaluation and a pain clinic program.

Appellant continued to work in a limited-duty capacity, conforming to the restrictions set by Dr. Van Linder. On October 19, 2000 a nurse practitioner noted in a modified-work assessment form that appellant experienced a "flare-up" of symptoms and set forth additional work restrictions. The nurse practitioner noted that he could return to modified work for a two- to three-week period subject to physical restrictions of sitting for 3 hours, standing for 5 hours, walking for 6 hours, occasional lifting up to 10 pounds, no bending, crawling or reaching above the shoulder, simple grasping of the right and left hands and no pushing and pulling.

In a letter dated October 21, 2000, the employing establishment notified appellant that it was unable to accommodate his new work restrictions as set forth on October 19, 2000.

On November 10, 2000 Dr. Hansen advised that appellant would be off work from November 3 to 18, 2000, in order to reduce the aggravation of his condition. He did not list any restrictions after November 18, 2000. In a note dated November 9, 2000, a nurse practitioner

[1] On June 18, 1997 appellant filed a claim for compensation alleging that on June 15, 1997 he injured his back while in the performance of duty, file number 14-0324898. The claim was accepted for lumbar subluxation, which resolved no later than September 10, 1997. This claim was consolidated with the current claim before the Board.

noted that appellant would be given a trial of light duty for two weeks and thereafter resume regular duties. On November 15, 2000 Dr. Steven Jewitt, a Board-certified psychiatrist and neurologist requested that the Office delay any decision with regard to appellant's return to work until December 18, 2000 because he was undergoing active treatment.

On December 1, 2000 appellant resigned from the employing establishment for medical reasons.

On August 1, 2001 the Office referred appellant to Dr. Allan R. Wilson, a Board-certified orthopedic surgeon, to determine if he had residuals from his work injury of August 6, 1998. The Office provided him with appellant's medical records, a statement of accepted facts as well as a detailed description of his employment duties. In a report dated August 17, 2001, Dr. Wilson indicated that he reviewed the records provided to him and performed a physical examination of appellant and noted that neurological examination was essentially unremarkable. He diagnosed cervicothoracic straining injury of August 6, 1998 resolved, prior subluxation from an injury of June 15, 1997, lumbar degenerative disc disease without herniation or nerve root impairment probably secondary to the accepted condition of June 15, 1997 and extreme emotional lability/depression. Dr. Wilson advised that there was no clinical or radiographic evidence of cervical or thoracic subluxations based on new x-rays and that physical examination documented some pain behavior but was otherwise unremarkable. He advised that appellant returned to baseline status and noted that his complaints may have a psychogenic origin for which he recommended a psychiatric examination. Dr. Wilson opined that appellant had no ratable impairment to the cervical, dorsal or lumbar spine, but noted early degenerative disc disease at L5-S1 without a herniated disc or nerve root encroachment; however, advised that this was not caused by his accepted work-related injuries. He prepared a work capacity evaluation advising that appellant could return to work full time with restrictions on pushing, pulling and lifting and noted that these restrictions were based on appellant's subjective complaints, not objective findings.

On September 10, 2001 appellant filed a recurrence of disability. He indicated that he had a recurrence of back pain commencing on August 6, 1998. Appellant noted that after his original injury he returned to a limited-duty position. The supervisor noted on the CA-2a form that appellant continued to be provided with light-duty work; however, as his condition worsened, the employing establishment was not able to accommodate his restrictions. It was further noted that Dr. Hansen placed him off work on November 3 to 18, 2000 and he resigned on December 1, 2000.

By decision dated December 31, 2001, the Office denied appellant's claim for recurrence of disability on the grounds that he did not submit sufficient medical evidence to establish that he sustained a recurrence of disability which was causally related to the accepted employment injury sustained on August 6, 1998.

On January 23, 2002 appellant requested an oral hearing.

In a letter dated April 2, 2003, a senior claims examiner noted that due to the employing establishment's inability to accommodate appellant's limitation on October 21, 2000, he would be paid compensation benefits up to December 2, 2000, the date appellant's physician returned

him to regular duty. The claims examiner noted that the recurrence claim filed on September 10, 2001 provided a recurrence of disability date of August 6, 1998. The Office deemed this date to be in error, advising that this was the date of a new injury accepted by the Office. The Office requested that appellant submit contemporaneous medical evidence to establish a recurrence of disability on or after December 2, 2000.

In a letter dated April 2, 2003, the Office requested that the employing establishment indicate whether it would have been able to accommodate appellant's light-duty restrictions after December 18, 2000 or until his light-duty restrictions were removed by his physician. In a letter dated May 1, 2003, the employing establishment noted that appellant's position was available on and after December 18, 2000 and he would have been accommodated for restrictions not greater than what he was working prior to October 21, 2000.

By letter dated April 16, 2003, appellant contended that he was never released to regular duty. He noted that his work restrictions expired early because the physician failed to properly diagnose his condition. Appellant contended that he was forced from the employing establishment because there was no light-duty job.

In a decision dated June 12, 2003, the Office denied appellant's claim for a recurrence of disability. The Office noted that further medical treatment was not authorized and would be terminated.

On June 14, 2003 appellant requested an oral hearing before an Office hearing representative. The hearing was held on May 4, 2004. Appellant submitted an undated report from Dr. Jewitt, who diagnosed severe depression, which did not respond to medication. He opined that appellant's depression was incapacitating and advised that he would not return to employment. An x-ray report of the cervical spine dated March 14, 2001 revealed slight degenerative changes at C6-7 and mild rightward bowing. A thoracolumbar spine x-ray revealed trace degenerative change and atherosclerosis. A chest x-ray of March 28, 2001 revealed no abnormalities. A magnetic resonance imaging scan dated July 12, 2001 revealed mild broad based central disc protrusion at L5-S1.

In a decision dated July 19, 2004, an Office hearing representative found that appellant did not establish any disability after November 18, 2000, due to his 1998 employment injury.

LEGAL PRECEDENT

When an employee, who is disabled from the job he held when injured on account of employment-related residuals, returns to a light-duty position or the medical evidence of record establishes that he can perform the light-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and show that he cannot perform such light duty. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.[2]

[2] *Terry R. Hedman*, 38 ECAB 222 (1986).

ANALYSIS

The record reflects that for the period October 21 to December 2, 2000 the Office found that the employing establishment was unable to accommodate appellant's work restrictions. He resigned on December 1, 2000. By letter dated April 2, 2000, the Office noted that due to the employing establishment's inability to accommodate his work restrictions, appellant would be paid compensation benefits up to December 2, 2000. The record reflects in a daily computation log and daily rolls payment dated July 13, 2001 that appellant was paid compensation benefits for this period. Therefore, the issue is whether appellant's disability on or after December 2, 2000 is causally related to his federal employment injury.

With regard to the period of disability commencing December 2, 2000 the Board finds that appellant has not submitted sufficient evidence to support a change in the nature and extent of the injury-related condition or a change in the nature and extent of the light-duty requirements.

Regarding whether there was a change in the injury-related condition, reports from Dr. Hansen dated August 30, 2000, advised that he did not anticipate seeing appellant any further for his injury.[3] In a time loss/restriction authorization dated November 10, 2000, Dr. Hansen advised that appellant would be off work from November 3 to 18, 2000, in order to reduce aggravation of his condition, but that he could return to his regular duties on November 18, 2000. He did not indicate a specific date of a recurrence of disability, nor did he note that there were any restrictions or disability dated November 18, 2000. The reports of Dr. Hansen do not support appellant's claim of a recurrence of disability commencing December 2, 2000.

The reports from Dr. Welch fail to support that appellant sustained a recurrence of disability on December 2, 2000. On August 10, 2000 Dr. Welch discharged appellant from his care advising him that he did not have major lower back or radicular symptoms to the point where he would require further diagnostic tests, surgery or physical therapy. In a report of October 29, 2001, he recommended a psychological evaluation and a pain clinic program. Dr. Welch did not support that appellant had any disability on or after December 2, 2000 due to the August 6, 1998 employment injury. Therefore, these reports are insufficient to meet appellant's burden of proof.

Dr. Jewitt, a psychiatrist, requested that the Office delay a decision with regard to appellant's return to work until December 18, 2000 because he was undergoing active treatment. He diagnosed severe depression which did not respond to medication and opined that appellant's depression was incapacitating and that he would not return to employment. However, Dr. Jewitt did not specifically address the issue of whether appellant had a recurrence of disability attributable to his accepted employment injuries, cervical and thoracic subluxations. Therefore, these reports are insufficient to establish his claim of employment-related disability commencing December 2, 2000.

[3] Section 8101(2) of the Federal Employees' Compensation Act provides that chiropractors are considered physicians "only to the extent that their reimbursable services are limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by x-ray to exist and subject to regulations by the Secretary"; *see* 5 U.S.C. § 8101(2). 20 C.F.R. § 10.400(e). In this case, the record reflects that on August 7, 1998 Dr. Hansen diagnosed subluxations of the cervical and thoracic spine and is, therefore, considered a physician.

Other diagnostic reports and medical reports submitted by appellant, including an x-ray of the cervical spine dated March 14, 2001, a thoracolumbar spine x-ray of the same date, a chest x-ray dated March 28, 2001 and an MRI scan dated July 12, 2001. The diagnostic studies do not address whether he sustained a recurrence of disability on December 2, 2000 causally related to the August 6, 1998 work injury. Therefore, the Board finds that appellant has not met his burden of proof in establishing that there was a change in the nature or extent of the injury-related condition.

The Board notes that on August 1, 2001 the Office referred appellant to Dr. Wilson, who in a report dated August 17, 2001, diagnosed cervicothoracic straining injury of August 6, 1998 resolved, prior subluxation from an injury of June 15, 1997, lumbar degenerative disc disease without herniation or nerve root impairment probably secondary to the accepted condition of June 15, 1997 and extreme emotional lability/depression. He advised that there was no clinical or radiographic evidence of cervical or thoracic subluxations based on the new x-rays and that his physical examination was unremarkable except for documenting some pain behavior. Dr. Wilson advised that appellant returned to baseline status and noted that his complaints could have a psychogenic origin and recommended psychiatric examination. He prepared a work capacity evaluation advising that appellant could return to work full time with restrictions on pushing, pulling and lifting and noted that these restrictions were based on appellant's subjective complaints not objective findings.

Appellant also has not established a change in the nature and extent of the light-duty requirements. The record indicates that the Office authorized compensation for the period that his restrictions were not accommodated until the time that appellant voluntarily resigned on December 1, 2000. The Board's review of the record does not clearly indicate that he was under specific work restrictions imposed by a physician at the time that he resigned. The employing establishment, in a letter dated October 21, 2000, notified him that his position remained available and he would be accommodated for restrictions not greater than what he was working prior to October 21, 2000. When a claimant stops working at the employing establishment for reasons unrelated to his employment-related physical condition, he has no disability within the meaning of the Act.[4] The Board finds that there is no credible evidence which substantiates that appellant experienced a change in the nature and extent of the light-duty requirements or was required to perform duties that exceeded his medical restrictions for the period subsequent to December 2, 2000. The record is void of evidence which would indicate that there was a change in the nature and extent of the light-duty requirements or that he was required to perform duties which exceeded his medical restrictions.

CONCLUSION

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability commencing December 2, 2000.

[4] *See Mitchell D. Ellis*, 30 ECAB 1214 (1979). *Cf. John W. Normand* 39 ECAB 1378 (1988) (where the claimant was removed from his light-duty position for disciplinary reasons, the Board found no disability within the meaning of the Act).

ORDER

IT IS HEREBY ORDERED THAT July 19, 2004 decision of the Office of Worker' Compensation Programs is affirmed.

Issued: June 13, 2005
Washington, DC

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

A. Peter Kanjorski
Alternate Member